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IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN IN GEORGE TOWN, GRAND CAYMAN

SCA #62 OF 2002

MERVIN CUMBER

VS

REGINA

Reasons for Judgment delivered by THE HONOURABLE

MR. JUSTICE HENDERSON on Friday, May 16, 2003,

at George Town, Grand Cayman.

APPEARANCES:

For the APPELLANT:

MR. L. AIOLFI

For the RESPONDENT:

MRS. SMITH-ANDALCIO

1 COURT COMMENCED ON FRIDAY,

2 MAY 16 AT 5:04 P.M.

3

4 THE COURT: This appeal, by way of case
5 stated, raises an important question relating
6 to how the Crown may establish its case on a
7 drinking driving prosecution.

8 Mr. Cumber was found driving a motor
9 vehicle on July 1st, 2000. A sample of his
10 breath was demanded. The reading proved to be
11 over the legal limit. The device used to
12 measure the amount of alcohol in his breath was
13 a machine known as the "Intoxilyzer 5000 EN".
14 The letters "EN" stand for "enhanced".

15 At his first trial, it was pointed out
16 that the instrument in question does not appear
17 in the short list of instruments prescribed for
18 this purpose by the Governor. The list
19 prescribes only the Intoxilyzer and the
20 Intoxilyzer 5000. He was acquitted.

21 On an appeal by the Crown to this Court,
22 Graham, J., remitted the matter to the Summary
23 Court and directed that court to "hear evidence
24 and determine whether the Intoxilyzer 5000 EN
25 is a prescribed machine by virtue of the

(CUMBER v R. 16/06/03 kam)

(THE COURT - REASONS FOR JUDGMENT)
1 Traffic Prescription of Measuring Devices Order
2 (1999 revision)".

3 A new trial was held. The learned
4 Magistrate heard technical evidence about the
5 machine. Ultimately, she came to two
6 conclusions:

7 First, that the Intoxilyzer 5000 EN was
8 not the same device as the Intoxilyzer 5000 and
9 it was, therefore, not the gazetted device.

10 Second, that the evidence concerning the
11 operation of the device and the modifications
12 made to it in the enhanced version was
13 essentially irrelevant to the question, given
14 that the manufacturer had changed the name by
15 which it designates the machine.

16 Each of those two conclusions has been
17 challenged by the Crown in this appeal by way
18 of case stated.

19 The statutory regime is a common one which
20 exists in similar form in Australia, the United
21 Kingdom and Canada.

22 In the Cayman Islands, the Governor is
23 empowered by section 92 of the Traffic Law
24 (1999 revision) to make regulations prescribing
25 "types of alcohol in breath measuring devices

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1 which may be used for breath tests under
2 section 72".

3 The significance of using a prescribed
4 machine is this. Ordinarily, in the absence of
5 a statutory regime such as the one under
6 discussion, the Crown would have to prove by
7 admissible expert evidence that the measured
8 blood alcohol level of the defendant at the
9 time he took the breath test was in fact his
10 blood alcohol level earlier, at the time of
11 driving. For a number of reasons, that is a
12 difficult proposition to prove.

13 The legislation provides that, where a
14 device prescribed by the Governor is used to
15 measure the amount of alcohol in the breath,
16 there is a prima facie presumption that that
17 proportion of alcohol was also the proportion
18 of alcohol existing in the blood at the time of
19 driving. The difficulty of proof to which I
20 referred earlier is thus overcome by a useful
21 presumption.

22 As I have indicated, the case asks two
23 questions. I find it appropriate to answer the
24 second question first.

25 The second question reads as follows:

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1 "Whether the court erred in law
2 in holding that the evidence
3 that goes to show that the
4 essential operation of the
5 device remains unchanged by the
6 modifications is not relevant
7 where, on the face of it, the
8 device producing the certificate
9 is not a gazetted device ie.,
10 neither an Intoxilyzer nor an
11 Intoxilyzer 5000?"

12 My answer to that question is "yes." The
13 learned Magistrate did err in law in reaching
14 that conclusion. I place considerable
15 significance on the use of the word "types" in
16 section 92 of the Traffic Law. The Governor is
17 not empowered to make regulations prescribing
18 specific named devices, but rather "types of
19 alcohol in breath measuring devices".

20 Based on the language of the section, and
21 also on certain common sense considerations --
22 to which I will refer in a moment -- it is open
23 to the Crown on any prosecution of this sort to
24 attempt to prove that a certain device actually
25 used to measure alcohol in breath was of a

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1 "type" prescribed by the regulation, albeit
2 with a different name from any of those listed.
3 That requires, of course, an analysis of the
4 design, construction and workings of the
5 machine in question and of the type of machine
6 named in the regulation. There must be a
7 comparison.

8 If it is found that the machine actually
9 used is, in substance, the same as the type
10 prescribed, the Crown may rely on the prima
11 facie presumption. To hold otherwise would be
12 to elevate form over substance. The names and
13 model designations of these machines are
14 ascribed to them by the manufacturers. It is
15 open to a manufacturer to change the name or
16 the model designation at any time and for any
17 reason. A manufacturer would be at liberty to
18 do that, for example, solely for advertising
19 purposes, and without having made any change
20 whatsoever in the design, construction or
21 workings of the machine itself.

22 The purpose of section 92 of the Traffic
23 Law is to ensure that a reliable agency, under
24 the auspices of the Governor, makes a
25 scientific examination of the type of machine

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1 in question and determines that it performs its
2 intended function accurately. Nothing,
3 ultimately, should turn on the name given to
4 the device by its maker.

5 The first question reads as follows:

6 "Whether the court erred in
7 finding that the Intoxilyzer
8 5000 EN was not the same device
9 as the Intoxilyzer 5000 and that
10 it was therefore not the
11 gazetted device".

12 The answer to that question requires some
13 analysis of the evidence that was before the
14 learned Magistrate and her conclusions about
15 it.

16 In the case stated, she says that the
17 machine known as the "Intoxilyzer 5000 EN" is
18 an improved version of the Intoxilyzer 5000.
19 She found that there was one substantial change
20 to the device; a flow sensor was installed to
21 replace what used to be a pressure switch to
22 monitor the breath sample. She also found that
23 other features were changed to make it easier
24 for technicians to work on the machine,
25 although she found that those other features

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1 did not affect what she called the "operation
2 of the machine".

3 The Magistrate went on to say that the
4 unchallenged opinion of the Crown expert was
5 that the 5000 EN is "electronically entirely
6 different to the 5000. It does the same
7 function, it just does it in a different way".
8 She found that the "analytical bench" has not
9 changed in any of the models of the
10 Intoxilyzer; that is to say, they all work by
11 capturing a sample of breath and applying infra
12 red light to that sample.

13 Later in the case, the learned Magistrate
14 referred to an admission by the Crown that the
15 Intoxilyzer 5000 EN is considered "new" by its
16 manufacturers.

17 In her findings, the learned Magistrate
18 accepted the premise that an alcohol in breath
19 measuring device may be modified or re-tooled
20 without becoming something different. She
21 referred to the decision of the Supreme Court
22 of South Australia in *South Australian Police v*
23 *Hemsley*, number SCGRG 94/354, judgment number
24 4907, a decision of a three judge bench, which
25 analysed this question in some detail. She

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1 then said the Hemsley case is distinguishable
2 because in that case both the prescribed device
3 and the device used by the police had the same
4 name and model number. They were each called
5 the "Drager Alcotest 7110". The effect of the
6 Australian ruling was to allow the defence to
7 go behind the face of the certificate and
8 enquire into the changes actually made to the
9 device even though the name of it had not
10 changed.

11 The learned Magistrate said:

12 "I accept that evidence and the
13 assertions made that the two
14 machines - the 5068 series and
15 the 5000 EN - are not the same
16 machine. The differences are
17 not significant in the
18 analytical portion of the
19 machine. By that I understand
20 the witness to mean that the
21 breath was analysed in the usual
22 way by the application of infra
23 red light to a sample of
24 breath."

25 She went on to say:

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1 "I accept and find that the
2 Intoxilyzer 5000 EN and the
3 Intoxilyzer 5000 are not the
4 same machine. The changes can
5 only be regarded as far reaching
6 if the two devices are
7 'electronically entirely
8 different'. I am of the view
9 that it does not matter one wit
10 if the analytical bench or the
11 way the machine operates remains
12 unchanged or is in fact improved
13 by all the manufacturers'
14 modifications. If the
15 manufacturer changes the
16 machine's designation, then
17 fresh approval is necessary."

18 Later she said:

19 "The test cannot be whether or
20 not the machines performed the
21 same function."

22 As I have already indicated, I think the
23 learned Magistrate fell into error when she
24 said:

25 "If the manufacturer changes the

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1 machine's designation, then
2 fresh approval is necessary."

3 In my view, fresh approval is necessary
4 when there is a change of substance in the
5 design, construction or working of the machine.

6 However, the extracts I have quoted make
7 it clear that the learned Magistrate did in
8 fact address her mind to the issue of whether
9 or not the changes made at the time the
10 Intoxilyzer 5000 EN was placed on the market
11 were of sufficient substance to render it a
12 different machine from the Intoxilyzer 5000.
13 She concluded clearly that they were not the
14 same machine. Her reasons for doing so were
15 derived from unchallenged evidence. She
16 pointed out that the Crown's expert said they
17 were "electronically entirely different".

18 I find myself in respectful agreement with
19 the learned Magistrate, and my answer to the
20 first question is therefore "no".
21
22

23 Henderson, J.

24 Hon. Justice Henderson

25